

No. 42153-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Donald King,

Appellant.

Thurston County Superior Court Cause No. 10-1-01633-7

The Honorable Judge Paula Casey

Appellant's Reply Brief

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ARGUMENT

I. MR. KING WAS ENTITLED TO INSTRUCTIONS ON SELF-DEFENSE.

A. Mr. King produced “some evidence” of self-defense.

A person accused of assault is entitled to self-defense instructions if there is “some evidence” of self defense. *State v. Werner*, 170 Wash.2d 333, 337, 241 P.3d 410 (2010). This evidence may derive “from ‘whatever source’ and... does not need to be the defendant’s own testimony.” *State v. Walker*, 164 Wash.App. 724, 729 n. 5, 265 P.3d 191 (2011). The court must draw all reasonable inferences in the light most favorable to the accused person. *State v. Webb*, 162 Wash.App. 195, 208, 252 P.3d 424 (2011); *State v. George*, 161 Wash.App. 86, 96, 249 P.3d 202 (2011). The burden on the defendant is low, and the evidence need not be enough to create a reasonable doubt. *George*, at 96.

Here there was at least “some evidence” of self defense. Brockley testified that she punched Mr. King in the face and that he pushed her away and onto a glass table, which broke. RP (3/22/11) 69, 169, 179, 181. Independent witnesses (and photographic evidence) confirmed that Mr. King had a black eye. RP (3/22/11) 194, 206. This evidence gives rise to a reasonable inference that Mr. King pushed Brockley in self-defense. It is immaterial that the inference is based on circumstantial evidence rather

than direct testimony; as the court told jurors, “[t]he law does not distinguish between direct and circumstantial evidence.” CP 40; *Walker*, at 729 n. 5.

Accordingly, the trial court erred by refusing to instruct the jury on self-defense.¹ *Werner*, at 337. Respondent’s contrary argument appears to be based on its characterization of “the *majority* of Brockley’s testimony,” which, Respondent contends, undermines the self-defense claim. Brief of Respondent, p. 10 (emphasis added).

This argument applies the wrong legal standard. In evaluating a request for self-defense instructions, the court must take the evidence in a light most favorable to the defendant, and draw all reasonable inferences in favor of giving the instructions. *Webb*, at 208; *George*, at 96.

Respondent asks the court to ignore this rule by focusing on the “majority” of Brockley’s testimony, and by disregarding those (minority) portions that support Mr. King’s argument. Brief of Respondent, pp. 10-12.

Similarly, Respondent’s claim that “[i]f anything, the evidence showed that King’s actions were retaliatory” applies the wrong legal standard, by erroneously drawing inferences *against* giving the instructions. Brief of Respondent, p. 11.

¹ The trial judge ruled, incorrectly, that self-defense could not be raised if the defendant didn’t testify. RP (3/22/11) 210.

Brockley's testimony that she punched Mr. King in the face while sitting on him (causing a black eye), and that he pushed her off (and into the glass table) constitutes at least "some" evidence of self-defense, especially when taken in a light most favorable to the defense. *Werner*, at 337. Under these circumstances, the court's erroneous refusal to instruct on self-defense deprived Mr. King of due process. *Id.* His assault convictions must be reversed and the charges remanded for a new trial. *Id.*

B. The court's refusal to instruct the jury on self-defense requires reversal of Mr. King's assault convictions.

Failure to instruct on an accused person's theory of the case requires reversal if there is evidence to support the theory. *State v. Williams*, 132 Wash.2d 248, 260, 937 P.2d 1052 (1997). In this case, there was evidence of self-defense; accordingly, the failure to provide self-defense instructions requires reversal. *Id.*

Respondent erroneously tasks Mr. King with showing that "he was fearful of 'imminent danger of death or great bodily harm.'" Brief of Respondent, p. 12 (citing *Werner*). This standard does not apply to the use of non-deadly force. *State v. Kylllo*, 166 Wash.2d 856, 863, 215 P.3d 177 (2009) ("Because non-deadly force is at issue in this case, the jury should have been informed, as RCW 9A.16.020(3) provides, that a person is

entitled to act in self-defense when he reasonably apprehends that he is about to be *injured*. One is not required to believe he is about to be grievously harmed or killed.”) (Emphasis in original).

Nor was Mr. King required to introduce anyone’s opinion that his actions were reasonable.² *See* Brief of Respondent, pp. 12-13. The jury is charged with determining what is reasonable, based on the actions taken. No published Washington case has ever held that opinion testimony is required to prevail on a self-defense claim.

Mr. King introduced “some” evidence that he acted in self-defense when he pushed Brockley. He was entitled to instructions on self-defense. *Werner*, at 337. The court’s failure to provide such instructions requires reversal of the assault convictions. *Williams*, at 260.

II. THE PROSECUTOR’S EGREGIOUS MISCONDUCT IN CLOSING ARGUMENT INFRINGED MR. KING’S RIGHT TO DUE PROCESS AND TO A JURY TRIAL.

A. The prosecutor contradicted the court’s instructions and appealed to the passions and prejudices of the jury.

A prosecutor commits misconduct by making arguments that (1) contradict the court’s instructions, or (2) appeal to the jury’s passions and prejudices. *State v. Davenport*, 100 Wash.2d 757, 760, 675 P.2d 1213

² Such opinion testimony would likely be inadmissible, unless it was in the form of expert testimony.

(1984); *United States v. Ayala-Garcia*, 574 F.3d 5, 16 (1st Cir. 2009); *see also* CP 34. In this case, the prosecutor did both, suggesting that Mr. King's prior acquittals could be used to evaluate Brockley's credibility (in violation of Instruction No. 35, CP 70), and that the jury should convict Mr. King in order to rectify the harm allegedly caused by the prior acquittals. RP (3/23/11) 253, 274.

Respondent's arguments support Mr. King's position. First, Respondent points out that the prosecutor's comments (about Mr. King's prior charges) were intended "to explain why Brockley changed her story." Brief of Respondent, p. 15.³ This is correct; however, it was also a forbidden use of the evidence. Mr. King strongly objected to the introduction of the evidence, and the court admitted it solely for the purpose of rebutting any claim of accident or mistake. RP (3/7/11) 26; CP 70. By using the testimony as evidence bearing on Brockley's credibility, the prosecutor violated the court's ruling and contradicted the court's explicit instructions to the jury.

Second, Respondent claims that the statements at RP (3/23/11) 274 were meant to address Brockley's relationship with the prosecuting

³ Respondent also defends the prosecutor's argument at RP (3/23/11) 250. Brief of Respondent, p. 16. Mr. King did not challenge these statements as improper. *See* Appellant's Opening Brief.

attorney's office. Brief of Respondent, p. 16. This, too, amounts to an acknowledgment that the prosecutor improperly used evidence of the prior charge for a forbidden purpose. By using the testimony as evidence of Brockley's relationship with the prosecutor's office, the state violated the court's ruling and contradicted the court's explicit instructions to the jury.

Respondent's argument on this point suffers from additional flaws. Respondent's assertion that the prosecutor was "merely refut[ing] King's claim that Brockley 'had had a deteriorating relationship with the prosecutor...'" is questionable: the prosecutor's statement that Brockley "had just gotten a not guilty verdict" and "had doubts that the system would work for her" can hardly be described as a refutation.

Furthermore, the improper argument cannot be rescued by characterizing it as a response to Mr. King's argument, since a defense attorney does not have the "power to 'open the door' to prosecutorial misconduct." *State v. Jones*, 144 Wash.App. 284, 295, 183 P.3d 307 (2008). Regardless of defense counsel's arguments, the prosecutor should not have made arguments that conflicted with the court's instructions and appealed to passion or prejudice.

The prosecutor's improper arguments violated Mr. King's right to due process and his right to a jury trial. The misconduct requires reversal of his convictions and remand for a new trial. *Davenport*, at 760; *Ayala-*

Garcia, at 16; see also *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009).

III. COUNTS I AND II SHOULD HAVE SCORED AS THE SAME CRIMINAL CONDUCT.

Two or more offenses comprise the same criminal conduct if they “require the same criminal intent, are committed at the same time and place, and involve the same victim...” RCW 9.94A.589(1)(a).

Simultaneity is not required. *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997). The prosecution bears the burden of proving that multiple convictions should score as separate conduct. *State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied at* 131 Wash.2d 1006, 932 P.2d 644 (1997).

In this case, the two assaults were committed with the same intent, at the same time and place, against the same victim. Accordingly, the state failed to prove that they should score separately; Mr. King’s sentence must be vacated and the case remanded for correction of the offender score and resentencing. *Id.*

Respondent acknowledges that both offenses involved the same victim, but erroneously disputes the other factors, making an analogy to *Price*. Brief of Respondent, pp. 20-21 (citing *State v. Price*, 103 Wash.App. 845, 14 P.3d 841 (2000)). But in *Price*, the defendant fired

once while on foot in a parking lot, and a second time from his vehicle after pursuing his victims onto an interstate on-ramp. *Price*, at 849-850.

Here, by contrast, the evidence suggested that the second assault followed closely after the first, during an ongoing struggle that involved Mr. King kicking Brockley, Brockley punching Mr. King in the face, and then Mr. King pushing Brockley into the glass table. Nothing in the record establishes the kind of break that occurred in *Price*.

The prosecution failed to prove that the two offenses should score separately. The sentence must be vacated and the case remanded for correction of the offender score and a new sentencing hearing.

CONCLUSION

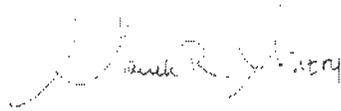
Mr. King's convictions in Counts I-III must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on February 29, 2012.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 29, 2012.



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